Supreme Court U.S.
FILED
AUG 2 6 2010
OFFICE OF THE CLERK

No. 09-1509

IN THE

Supreme Court of the United States

COAST AUTOMOTIVE GROUP, LTD., *et al.*,

Petitioners,

v.

MERCEDES BENZ, U.S.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

GEOFFREY J. HILL, ESQ.
ATTORNEY-AT-LAW
Attorneys for Petitioners
110 Chestnut Ridge Road
Suite 325
Montvale, New Jersey 07645
(201) 505-1033
geoffjhill@aol.com

231790

COURTCRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

There are no amendments to the corporate disclosure statement in Coast's Petition.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT ..	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
ARGUMENT IN REPLY	1
I. Respondents' Oppositions Amplify That The Lower Courts Did Not Observe This Court's Antitrust And Summary Judgment Precedent.	1
II. Respondents' Oppositions Attempt To Perpetuate The Lower Courts Improper Rule Blending And Confusing Antitrust Liability And Damages And Do Not Articulate A Challenge To The Otherwise Widely Accepted Methodology Of Damages Calculation Relied Upon By Coast's Experts.	5
III. Coast's Antitrust Damages Claims Are Not Affected By The Lower Courts' Rulings On Other Theories.	12
IV. This Matter Is Worthy Of Review By This Court.	12
CONCLUSION	14

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946) 3

Bob Willow Motors, Inc. v. General Motors Corp., 872 F. 2d 788 (7th Cir. 1989) 8, 9, 11

Daubert v. Merrill Dow Pharmaceutical, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) 11

In Re. Mercedes Benz Antitrust Litig., 2006 U.S. Dist. LEXIS 51202 ..... 2, 3

Poller v. Columbia Broadcasting Sys., Inc. 368 U.S. 464, 82 S. Ct 486, 7 L. Ed. 2d 458 (1962) 10

Randy's Studebaker Sales, Inc. v. Nissan Motor Corp 533 F2d 510 (10th Cir 1976) 9

Story Parchment v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931) 9, 12

Zenith Radio Corp v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 129 (1969) 7

Cited Authorities

Page

Secondary Sources:

Jacobson, Jonathan M. *Antitrust Law Developments 6th Edition.* ABA Section of Antitrust Law (2007) 6, 11

Internet Sites:

Website of law firm of Specter Roseman Kodroff & Willis *http://www.srkw-law.com/our-attorneys/jeffrey-corrigan.html* 13

ARGUMENT IN REPLY

I. Respondents' Oppositions Amplify That The Lower Courts Did Not Observe This Court's Antitrust And Summary Judgment Precedent.

The Respondents' defense of the lower courts' decisions is nothing more than a rehashing of their previous contentions, premised upon disputed facts and the self-serving inferences they wish drawn from those purported facts. *See* MBUSA Opp. At 5-10. Therein, however, lies the reason that this Court must act.

In failing to follow this Court's precedent, the lower courts blended together the otherwise distinct elements of antitrust "fact of damage" on the one hand and antitrust "measurement of damages" on the other.

In consideration of Coast's Petition, this Court need not, and should not, decide whose version of the facts is the correct one – to do so would be little more than "trial by affidavit" in another form. This Court, however, would conduct a plenary review of the case. Under such review, it becomes apparent that the lower courts failed to adhere to this Court's precedents, and failed to give any consideration whatsoever to Coast's facts, much less the consideration required by this Court's decisions.

Respondents have not refuted that the summary judgment evidence established that:

1) MBUSA explicitly threatened Coast that its allocation of inventory would be reduced if Coast refused to join the price-fixing conspiracy[1];

[1] The district court found that there was evidence in the record that MBUSA threatened to punish Coast:

> . . . Other evidence includes the testimony of George Zeigler, the sales manager at Coast Automotive Group in 1995. Zeigler said that MB USA Market Manager Joe Kurp told him that he had to sell certain vehicles "at list price and hold list price." (Corrigan Cert. 41 at 99.) Zeigler also claimed that Kurp told him that a failure to increase gross profit levels [on each vehicle i.e. *increase prices*] would result in a reduced allocation of vehicles. (Corrigan Cert. 43 at 385.)

(emphasis supplied) *In Re. Mercedes Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202 *50-51.

In fact, the district court repeatedly identified MBUSA's *threats of punishment* targeting Coast's allocation of vehicles:

> . . . MBUSA Market Manager Ed Chmielewski told Shansab that he was "required" to attend the Sheft Kahn [price fixing] meetings and submit confidential dealer financial information for distribution to the other dealers. (Cooper Cert. Ex. 44 at 913.) Shansab also testified that MBUSA Market Manager Joe Kurp threatened to reduce Shansab's supply of E-Class automobiles if he priced them too aggressively [*38] because the dealers had agreed not to discount them and the dealers were upset with Shansab's earlier discounting. (Corrigan Cert. Ex. 130 at 378.)

(Cont'd)

2) Coast declined to join MBUSA's conspiracy, and, among other things, refused to attend the MBUSA-mandated price-fixing meetings, where putatively competing New York Region Mercedes Benz dealers covertly exchanged confidential information related to pricing; (*supra* footnote 1);

3) After Coast refused to join the conspiracy, Coast's allocation of inventory was slashed, by 25% initially, and more thereafter[2]; and,

4) After years of this punishment, Coast's franchise was terminated by MBUSA in 1999.[3]

(Cont'd)
(emphasis supplied) *In Re. Mercedes Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202 *37-38; *see also, id.* at *48-49.

[2] MBUSA's own records confirmed that Coast's inventory had been slashed:

> . . . those [allocation] charts [submitted by MBUSA] tend to prove that MBUSA did in fact "[slash] the number of New Vehicles allocated to Coast" in 1995, the very year in which Coast contends that MBUSA did so. In particular, those [allocation] charts [submitted by MBUSA] reflect that MBUSA allocated to Coast 247 new vehicles in 1994, and 187 vehicles in 1995-a reduction of nearly 25 percent. *See* JA 858 (1994 allocation), JA 856 (1995 allocation).

Reply Brief of Appellant dated June 22, 2009 at p. 3; *compare*, 4a, 6a, 49a-54a.

[3] In its September 29, 2006 summary judgment dismissing Coast's case the district court's decision fully acknowledged (Cont'd)

This record clearly establishes the liability element of "fact of injury," "fact of damage" or "causation" sufficiently to overcome summary judgment in an antitrust case. Accordingly, Coast's petition should be granted.

(Cont'd)
that Coast had met all of the elements necessary for its antitrust claims to *survive* summary judgment:

> Here, a genuine issue of material fact exists regarding whether [MBUSA] retained an ulterior motive for terminating Coast's franchise agreement, namely that [MBUSA] sought to punish Coast defendants for refusing to participate in an alleged price fixing conspiracy.
>
> . . . But, this Court has already determined in the related class action that genuine issues remain regarding the existence of any conspiracy. Here, there remains a genuine issue regarding whether Coast defendant's alleged resistance to such an alleged conspiracy formed the basis for retaliatory conduct on the part of [MBUSA] by terminating the franchise agreement. Regardless of whether an independent, objective basis exists for such a termination, what remains at issue is the subjective motivations of the plaintiff. For these reasons, plaintiffs' motion for summary judgment on Counts Three and Four of Coast defendants' counterclaims is denied.

(emphasis supplied) 40a

II. Respondents' Oppositions Attempt To Perpetuate The Lower Courts Improper Rule Blending And Confusing Antitrust Liability And Damages And Do Not Articulate A Challenge To The Otherwise Widely Accepted Methodology Of Damages Calculation Relied Upon By Coast's Experts.

The lower courts blended and confused antitrust liability and antitrust damages calculation. As a result, the lower courts faulted Coast's damages calculation experts—an accountant and an economist—for not attempting to independently re-prove antitrust liability. That Coast's damages calculation experts did not attempt to re-prove antitrust liability was improperly found to be a failure in their damages calculation "methodology", and an attack on the "reliability" of their opinions. *Compare* MBUSA Opp. at 6.

In reality, Coast's damages calculation experts used the widely accepted "market share" methodology. Any "assumptions" that they made were based directly upon the application of this widely recognized and accepted methodology to the data found in the record. To make such calculations is not "speculation."

The facts of this case—including the *direct threats* made by MBUSA and the *subsequent slashing* of Coast's vehicle allocation from 1994 to 1995 (in the context of a Mercedes Benz market that doubled in a three year period beginning in 1995), followed by the termination of its franchise in 1999—already sufficiently established antitrust liability and "fact of damage," "fact of injury", or "causation" to overcome summary judgment under this Court's precedent. Respondents have shown no law or fact to the contrary.

By rejecting this Court's antitrust precedent and by failing to consider all the material facts as required, the lower courts improperly characterized Coast's liability position as matter of Shansab's "personal opinion," rather than facts and data which were firmly in the summary judgment record, and which were presumed to be true for summary judgment purposes. In particular, the district court had acknowledged MBUSA's threats extensively, and, *MBUSA's opposition does not even deny that these threats were made.* At the summary judgment stage, the lower courts were precluded from ignoring these facts, which were favorable to Coast, and which precluded summary judgment.

Coast's experts' charge was to calculate damages consistent with standard methodologies based upon the data in the record. Accordingly, accountant Markovitz did exactly as treatises and the caselaw suggest is the proper method to calculate lost profits in such circumstances. *See Antitrust Law Developments (Sixth)* (ABA Section of Antitrust Law 2007) "Proof of Damages—Calculation of Damages" at p. 842 stating:

> "Lost profits also have been established by estimating the market share a plaintiff would have had but for a defendant's violations and then determining, based on the size of the market and the plaintiff's likely profit margin, the total profits the plaintiff would have earned if the estimated market share had been achieved. In most cases, the estimated market share has been determined by reference to the plaintiff's market share before or after the violation. . . . [fn 178]"

see also, id. footnote 178 (citing "*See e.g. Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 106 & n. 11 (1969)).

In fact, the deposition of Coast's damages calculation expert Markovitz confirmed that the methodology Markovitz used and the data Markovitz relied upon were irrefutably consistent with the relevant authorities as accepted means of calculating lost profits:

> [Markovitz:]
>
> > . . . I based my report on the amount—[Coast's] percentage of the sales in the New York Region in 1994, when [Shansab] claimed was the last year he received a fair allocation of cars, and in increasing his unit sales every year after that, based on the percentage increase of sales in the New York Region, I came up with the number [units]he would have received . . . and then I compared it to the number of units he would have received to the total units in the region and his percentage share was close to what it was for 1994 to verify that I had done the projection correctly . . .

48a. This is a "market share" methodology, which is approved of by this Court's antitrust precedent. Respondents cannot, and do not, make a claim to the contrary.

In this way, Markovitz's methodology is exactly the analysis that the caselaw approves of in such circumstances:

> [Willow's expert] relied on actual sales by plaintiff during those periods when sufficient vehicles were delivered to the plaintiff dealership by the defendant manufacturer. [Willow's expert] further relied on national and regional sales to determine sales trends and market conditions in his efforts to determine those sales which plaintiff should have experienced for the pertinent periods. . .

See Bob Willow Motors, Inc. v. General Motors Corp., 872 F. 2d 788, 797 (7th Cir. 1989).

Moreover, Markovitz was permitted to rely upon Coast's competitors' sales to calculate Coast's damages from lost sales:

> To calculate damages, Willow had to estimate the number of cars it would have sold – and thus what its profits would have been – had GM not engaged in unconscionable practices. It was completely reasonable to look to national sales trends for this information. In a similar case, an expert witness estimated the number of cars a dealer would have sold in the absence of discriminatory allocation by looking to the dealer's competitor. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510[, 517-18] (10 Cir. 1976) . . .

> *Moreover, any uncertainty regarding the number of cars Willow would have sold is attributable to GM's unconscionable practices.* Thus, GM "is in an unfavorable position to complain of an uncertainty created by its own wrongdoing." *Randy's*, 533 F.2d at 518.

(emphasis supplied) *Bob Willow Motors*, 872 F.2d at 798 (additional citation omitted); *see also*, *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.* 533 F.2d 510, 518 (10th Cir 1976) ("And, where the defendant's wrongdoing created the uncertainty, it must bear the risk of that uncertainty and cannot complain. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 (1946)"); *see also, Story Parchment v. Paterson Parchment Paper Co.*, 282 U.S. 555, 63-64, 51 S. Ct. 248, 250, 75 L. Ed. 544, 548 (1931).

It is clear that MBUSA based its entire summary judgment argument on disputed facts and inferences it urged should be drawn in its favor from those facts. In this vein, MBUSA alleges that, after it slashed Coast's allocation and shrunk Coast's market share vis-à-vis its Mercedes Benz competitors (who were drawing away Coast's customers and potential customers with their increased allocations in a growing market), it offered Coast some vehicles over the course of the next several years that Coast did not immediately purchase from it. MBUSA Opp. at 9.

In contrast, Coast has presented that it had sold more vehicles than MBUSA allocated to it in two of the four years in question. Yet, its allocations were still inexplicably being reduced.

Coast pointed out the contradictions in MBUSA's own purported evidence:

> . . . Yet the sole page of documentary evidence upon which MB USA relies in this context in fact corroborates Shansab's contentions. In 1995 Coast sold more cars than it was allocated, and yet its allocation was cut by 10 percent in 1996. [Ray] Dupell Cert A. Likewise, in 1997, Coast again sold more cars than it was allocated and, again, its allocation was cut. *Id.*

Petition at 21.

MBUSA has never once attempt to explain how, in a growing market, Coast could legitimately receive a smaller allocation in 1995 than it did in 1994.

This Court has stated that a trial on the merits is the means for sorting out these anecdotal disputes and the parties' suggested inferences, and not a "trial by affidavit" as was conducted by the lower courts. Indeed, this Court expressly forbids "trial by affidavit" in cases such as this, where "motive" and "intent" are critical aspects.[4] *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 472-473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458, 464 (1962); *see also* Coast Petition at p. 38 regarding

[4] Respondents have attempted to assert a number of disputed facts as anecdotal arguments, none of which were even relied upon—or could have been relied upon—by the lower courts at the summary judgment stage.

Daubert v. Merrill Dow Pharmaceutical, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798, 125 L. Ed. 2d 469, 484 (1993).

Coast also noted that MBUSA's attempted explanation regarding its so-called "allocation procedure" or "allocation policy" was no more than "vague, after-the-fact testimony, rather than detailed contemporaneous documents," and was composed of "at least one subjective factor that even MBUSA's own witness could not quantify." *Reply Brief of Appellant* dated June 22, 2009 at p. 9.

If reliance on a wrongdoer's alleged "allocation" or "distribution" procedures was a recognized (or required) methodology for calculating lost profits in such a circumstance as this, surely *Antitrust Law Developments (Sixth)* (ABA Section of Antitrust Law 2007) "Proof of Damages—Calculation of Damages" would acknowledge that or an analogous proposition.

To the contrary, the applicable treatises and caselaw *reject* the proposition that Coast's experts were required to rely upon or even address MBUSA's alleged allocation procedures to faithfully complete their task. In *Bob Willow Motors, Inc. v. General Motors Corp.* the Seventh Circuit *rejected* the argument that plaintiff Willow's expert's total unfamiliarity with General Motors' *distribution procedures* rendered his damages expert opinion on lost sales and profits inadmissible. *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F. 2d 797. Accordingly, this Court should grant this petition and review this matter.

III. Coast's Antitrust Damages Claims Are Not Affected By The Lower Courts' Rulings On Other Theories.

In its Opposition Point III, MBUSA raises an argument that it raised below and which was not adopted by the lower courts. Neither of the lower courts have adopted MBUSA's position that any of Coast's antitrust claims or antitrust damages were in any way affected by any of the lower courts' other rulings under other theories in which anticompetitive "intent" was not an element. In fact, as detailed in footnote 3, *supra*, the district court found that *questions as to MBUSA's intent precluded summary judgment* on issues pertaining to Coast's termination where "intent" was an element. While MBUSA claims that this Court should bar Coast's antitrust termination claims on this basis, MBUSA did not cross-petition and does not claim any error by the lower courts—thus it is improper for MBUSA to attempt to raise this issue before this Court. Certainly, MBUSA's argument—even under its terms—could not have any relevance to Coast's pre-termination antitrust claims which were worth more than $6 million on their own. Therefore, this argument by MBUSA has no legal or factual bearing on Coast's Petition, and should be disregarded.

IV. This Matter Is Worthy Of Review By This Court.

This Court has repeatedly stated that a failure to hold antitrust wrongdoers accountable will "encourage violence," invite "depredation" and sanction "legalized robbery." *Story Parchment*, 282 U.S. at 564 65, 51 S. Ct. at 251, 75 L. Ed. at 549. Multiple news articles, a

multiyear Justice Department investigation, a successful consumer class action all confirm the importance of this matter. Irrespective of whether or not there were ultimately criminal convictions, MBUSA's plan to take its regional price-fixing plan nationwide was stopped because Shansab came forward. Likewise, in the same courthouse and under the same district court judge, the related consumer class action, based solely upon Shansab's whistleblowing, survived summary judgment and subsequently settled in or about 2009 for $17.5 million.[5]

None of this would have come to light but for Shansab coming forward on the belief that he would get his day in court, as required by almost a century of this Court's antitrust jurisprudence. The lower courts' new rule has totally undermined his or any subsequent parties' reliance on the enforcement of this Court's precedent.

The Respondents have provided no legal support for the lower courts' decisions. Given the clear failure of the lower courts to acknowledge any of this Court's precedents regarding antitrust summary judgment, antitrust injury, antitrust measurement of damages, and expert methodology, Coast submits that a summary reversal may be appropriate if this Court is unable to accept this matter for full review on the merits. Vacating the lower courts decisions with instructions that this Court's precedent governs would restore the proper antitrust rules. In whichever fashion this Court chooses

---

[5] *See http://www.srkw-law.com/our-attorneys/jeffrey-corrigan.html.*

to address this matter, Coast respectfully urges that the lower courts cannot be allowed to manufacture with impunity and without correction such new rules that have had and will continue to have such devastating effects on parties' legitimate rights and the proper administration of this Court's antitrust precedent. Accordingly, Coast's petition should be granted.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Court grant review of this matter.

Respectfully submitted,

GEOFFREY J. HILL, ESQ.
ATTORNEY-AT-LAW
Attorneys for Petitioners
110 Chestnut Ridge Road
Suite 325
Montvale, New Jersey 07645
(201) 505-1033
geoffjhill@aol.com